Tye Kow (t/a Hup Lee Trading) v Yap Seow Hwa & Anor

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–42 OF 1995
SURIYADI J
12 NOVEMBER 1999

Civil Procedure *— Judgment — Setting aside — Writ served by substituted service — Defendant claimed not aware of action against him — Whether advertisement must thoroughly cover state where defendant reside — Defence on merits — Whether judgment must be set aside*

The plaintiff entered into a contract to buy timber from the defendants and paid the defendants RM285,000. The balance of RM215,000 was to be paid when the defendants obtained a licence from the Forestry Department; otherwise, the sum of RM285,000 was to be refunded. The defendants did not inform the plaintiff when the lience was obtained and subsequently breached the agreement. In spite of the breach, the defendants did not refund the plaintiff RM285,000. The plaintiff brought an action against the defendant and entered judgment in default after serving the writ by substituted service. The plaintiff then commenced bankruptcy proceedings against the first defendant and served the notice through substituted service. When the first defendant learned about this, $3^1/_2$ years after the judgment was obtained, he filed this application to set aside the judgment in default on the grounds he was not aware of the action against him as he was tucked away in Kelantan and special concession ought to be granted to his predicament, in that the advertisement must cover that state thoroughly. Further, he contended that he had a good defence.

Held, dismissing the application with costs:

The court was satisfied that the adjudicator had sufficiently carried out his judicial duties when the order for substituted service was granted and that the advertisement was sufficient to notify the defendants. Further, the facts did not reveal any defence that had merits as the defendants had already obtained the licence when the contract was entered. The defendants misled the plaintiff when they entered into the contract and entered the contract with unclean hands (see p 178D–I).

[Bahasa Malaysia summary

Plaintif-plaintif telah memasuki satu kontrak untuk membeli kayu balak daripada defendan-defendan dan telah membayar defendan-defendan RM285,000. Baki RM215,000 perlu dibayar apabila defendan-defendan memperoleh lesen daripada Jabatan Perhutanan; jika tidak, jumlah RM285,000 perlu dikembalikan. Defendan-

defendan tidak memaklumi plaintif setelah memperoleh lesen tersebut dan kemudiannya telah melanggar perjanjian tersebut. Walaupun wujud pelanggaran, defendan-defendan tidak mengembalikan plaintif RM285,000. Plaintif telah memulakan tindakan terhadap defendan dan memasuki penghakiman ingkar setelah menyerahkan writ melalui penyampaian ganti. Plaintif kemudiannya memulakan prosiding kebangkrapan terhadap defendan pertama dan menyerahkan notis melalui penyampaian ganti. Apabila defendan pertama mengetahui tentang perkara ini, $3^1/_2$ tahun setelah penghakiman diperolehi, beliau telah memfailkan permohonan ini untuk mengetepikan penghakiman ingkar tersebut atas alasan beliau tidak mengetahui tentang tindakan terhadap beliau kerana beliau terperosok di Kelantan dan konsesi khas patut diberikan terhadap kesusahan beliau, di mana iklan tersebut mesti merangkumi keseluruhan negeri tersebut. Tambahan pula, beliau menegaskan bahawa beliau mempunyai pembelaan yang baik.

Diputuskan, menolak permohonan tersebut dengan kos:

Mahkamah telah berpuas hati bahawa hakim telah melaksanakan kewajipan kehakiman beliau dengan secukupnya apabila perintah untuk penyampaian ganti tersebut diberikan dan bahawa iklan tersebut adalah mencukupi untuk memberi notis kepada defendan-defendan. Tambahan pula, fakta-fakta tidak mendedahkan apa-apa pembelaan yang mempunyai merit kerana defendan-defendan telahpun memperolehi lesen tersebut semasa memasuki kontrak. Defendan-defendan telah memperdayakan plaintif semasa mereka memasuki kontrak tersebut dan memasuki kontrak tersebut tanpa tangan yang bersih (lihat ms 178D–I).]

Notes

For cases on setting aside judgments, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2789–2800.

Cases referred to

Ban Huat Seng Co Ltd v Lee Poh Soo [1967] 1 MLJ 145 (refd)
Jay & Anor v Budd [1898] 1 QBD 12 (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v UMBC [1994] 1 MLJ 312 (refd)
Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175 (refd)
Porter v Freudenberg [1915] 1 KB 858 (refd)
Watt v Barnett (1878) 3 QBD 183 (refd)

Ng Kong Peng (*KP Ng & Amardas*) for the plaintiff.
N Sivanesan (*Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc*) for the defendant.

Suriyadi J: It is common ground that on 14 May 1993, a written contract was negotiated between the plaintiff and the defendants, with the latter agreeing to sell timber to the plaintiff from an area, identified as Simpang Bukit Tinggi, Bentong, Pahang Darul Makmur ('the relevant area'). Pursuant to that agreement, the plaintiff was required to pay RM500,000 to the defendants, with the initial sum of RM285,000 being paid within the stipulated period. According to the defendants, the balance of RM215,000 was to be paid up the moment a licence was obtained from the Pejabat Hutan Negeri Pahang. Otherwise the RM285,000 was to be refunded. As per encl 20 para 11, by 26 April 1993 the defendants had obtained the rights to extract the timber. They further alleged that in spite of that predicament the plaintiff had failed to pay the balance of RM215,000. The plaintiff agreed on the initial facts except for the reason of the non-payment. As reflected by the statement of claim, the reason for the non-payment was that the defendants had failed to inform it of the receipt of the licence. The plaintiff further alleged that the defendants had failed/refused to keep up to the bargain and thus had breached the agreement. In spite of the breach, the defendants had failed to refund the said RM285,000, and in the process caused consequential losses to the plaintiff. Out of these sets of facts, a suit subsequently ensued, resulting in the above mentioned order.

On 7 February 1996 as per YSH-1 of encl 20, judgment in default of appearance was entered against the first defendant-cum-applicant for a sum of RM285,000 together with interest at the rate of 8% per year. This default judgement had a story of its own. The plaintiff after several attempts had failed to serve the writ by personal service, resulting in the plaintiff applying for substitute service, with that above-mentioned default judgement as the end product. After sometime, as that judgement sum was not satisfied, the plaintiff initiated bankruptcy proceedings against the applicant. The route and methodology of service of that bankruptcy notice was similar to that of the writ. On 21 June 1999 after a long delay of more than three years, the first defendant filed encl 21, which was a summons in chamber, praying that the above-mentioned order of 7 February 1996 be set aside.

Principally, the basis of this application was that the applicant was never informed of the action and thus was oblivious of the proceedings. He asserted that although the notice was supposed to have been sent to him by ordinary post, he never received it. Apart from that the applicant alleged that there was merit in his defence. After hearing the submissions of both parties, I dismissed the application with costs.

The applicant alleged that he merely had intelligence of the default judgement order sometime in March 1999, and even that was only after having received the bankruptcy notice. On receipt of that notice, he was nudged into filing this application.

In the course of the submissions, the applicant openly agreed that as the matter at hand was pursuant to a normal contract, and there being no requirement for a letter of demand, the latter issue therefore did not arise. The matter at hand therefore really centred on the issue of that substituted service relating to the writ proper, allegedly performed. That being so,

service is deemed to have been performed (*Watt v Barnett* (1878) 3 QBD 183). Technically, speaking, with the writ having been served, the applicant should have reacted forthwith by filing his appearance. This he failed to do. Due to that failure, the plaintiff had the recourse of applying for that default judgement, an application which was viewed favourably by the relevant adjudicator. The applicant's consternation only began when he received that bankruptcy notice, similarly served vide substituted service, which interestingly had found its way to him with such ease. The court after due consideration certainly found the conduct of the applicant suspect and not bona fide (*Ban Huat Seng Co Ltd v Lee Poh Soo* [1967] 1 MLJ 145; *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175). The applicant before me complained that the plaintiff had not done enough, in that the prerequisites in the court's order when granting the substituted service order was, not pervasive enough (see *Porter v Freudenberg* [1915] 1 KB 858). Having perused the evidence, I was satisfied that the court which previously granted the substituted service order must have been sufficiently impressed with the reasonings supplied by the plaintiff.

During the submission, the applicant vehemently ventilated that as he was tucked away in Kelantan, special concessions ought to be granted to his predicament, in that the advertisement must cover that state thoroughly. I posed the question that at that stage of the application no one had an inkling of his whereabouts, let alone being in that state. On hindsight, the newspaper that carried the relevant advertisement must surely cover the full breadth of Kelantan. Due to the vehemence of the stance, I was pressed to pose the question of what if England were to be where he was then residing. Was it necessary for the plaintiff to advertise in the British newspaper of the eg *The Times*? I did not receive a convincing reply. On those grounds I was satisfied that the adjudicator had sufficiently carried out his judicial duties when the order was granted (*Jay & Anor v Budd* [1898] 1 QBD 12). After the long delay of 3½ years he now wanted to deprive the plaintiff from the seat of the default judgment.

Apart from the above technical grounds, I was certainly not impressed by the honesty of the applicant. I now proceed to the matrix of the facts. The evidence adduced revealed that pursuant to the agreement, the applicant was to inform the plaintiff the moment the licence was obtained; but yet the former remained mum in spite of knowing that he already was in possession of the licence. In reality when the applicant sealed the contract with the plaintiff, the licence was already in his keeping. On that score the applicant had misled the plaintiff when agreeing to the contract. Indisputably the applicant entered the contract with unclean hands and thereafter moved to Kelantan. He went a step further when he collected another sum of money from another party without prior recession of the first contract with the plaintiff. That agreement with the new party ie Syarikat Perkayuan DRM, was signed on 14 July 93, two months after signing the material agreement with the plaintiff.

After due consideration I was satisfied that the facts did not reveal any defence that had merits (*Watt v Barnett*; *Hasil Bumi Perumahan Sdn Bhd &*

A *Ors v UMBC* [1994] 1 MLJ 312). I take further solace from the latter case where his Lordship Jemusi Serjan CJ (Borneo) at p 321H–I said:

> To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence there is no defence and the application must fail.

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Based on all the above reasons I had no compunction in dismissing the applicant's case with costs.

Application dismissed with costs.

C Reported by Chin En Tek

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